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Contracts in Restraint of Trade

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---CONTRACTS IN RESTRAINT OF TRADE---

T H E S I S

PRESENTED FOR THE DEGREE OF
BACHELOR OF LAW

-BY-

THOMAS FRANCIS CASSIDY

C O R N E L L U N I V E R S I T Y
S C H O O L O F L A W

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CONTRACTS IN RESTRAINT OF TRADE

Public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the state of his labor, skill or talent, by any contract into which he may enter. To put forth every effort for the accomplishment of useful ends and the happiness of himself and those dependent upon him is his mission and destiny. He is compelled by necessity which is the law of his being, to utilize and exercise his faculties and powers to procure shelter, food and raiment and it is only by a continuous struggle and in consequence of repeated failures and mistakes that he can hope to become an intelligent, self-reliant and morally responsible member of society. The law being cognizant of these facts and ever watchful for the welfare of the state, has thrown the arm of protection about them to ward off the attacks of designing men, who are ever on the alert to take advantage of improvident persons, who for slight temporary gain could be persuaded to relinquish the usual vocations which afforded them a means of livelihood and would ultimately become a public charge.

On the other hand, public policy requires that when a man has, by skill, or by any other means, obtained something which he wishes to sell, he should be at liberty to sell it

advantageously in the market, and in order to accomplish this desired result, he should be at liberty to preclude himself from entering into competition with the purchaser. The ability of the poor man to earn a livelihood lies in the strength and dexterity of his own hands. To hinder the employment of this strength and dexterity in what manner he thinks proper, or to prevent its sale in the market where the greatest returns may be had, is a manifest encroachment upon the just liberty both of the workman and those who might wish to negotiate with him and will not be tolerated by public policy. Hence public policy does not restrain him from alienating that which he wishes to alienate, but enables him to enter into any stipulation, however restricted it is, provided that restriction in the judgment of the court is not unreasonable, having regard to the subject matter of the contract.

These briefly are the lines of reasoning upon which is founded the doctrine of the common law, that a "Contract in restraint of trade is void as against public policy."

In proceeding to a general discussion of the merits and demerits of the question which forms the subject of our investigation and research, we must constantly bear in mind that the reasons above enunciated have been modified, as the laws of trade have become better understood, as our commercial system has been developed and by the enormous changes in our social state. They had their origin in the dark ages when the country was in a primitive state and to deprive a man of

the right to use his craft was to encourage idleness and render the person so restrained a dangerous member of society ; when the avenues of industry were few ; and when, as in England, the people were forced to unite in combinations and to exert their individual efforts in a common cause in order that they might be able to withstand the powerful political contrivances of William the Conqueror. The situation of to-day and the outlook of the future is vastly different to those barbarous times and call for new views and wider action. "Steam and electricity have for the purposes of trade and commerce almost annihilated distance and the whole world is now a market for the distribution of the products of industry ; the great diffusion of wealth and the reckless activity of mankind striving to better their condition have greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity and employment for capital and labor."

HISTORY

Among the most ancient rules of common law, we find it laid down that bonds in restraint of trade are void. The fact that the restraint was partial as to time or space had no weight whatever when the contract restrained the industrial or business freedom of the individual.

As early as the second year of Henry V. (A.D., 1415) we find by the year books, that this was considered old and set-

tled law. Through a succession of decisions, it has been handed down to us, unquestioned till the present time. It is true the general rule has from time to time been modified and qualified, but the principle has always been regarded as salutary.

For two hundred years the rule continued unchanged and without exceptions. Then an attempt was made to qualify it by setting up a distinction between sealed instruments and simple contracts. But this could not be sustained upon any sound principle. A different distinction was then started, between a general and a limited restraint of trade, which has been adhered to down to the present day.

In the great and leading case on this subject, *Mitchell vs. Reynolds* reported in 1 P. Wms, 181, the distinction between contracts under seal, and not under seal was finally exploded and the distinction between limited and general restraints fully established. The court enriched by deep learning and indefatigable research entered into an elaborate and exhaustive discussion of all contracts in restraint of trade. Ever since that decision contracts in restraint of trade generally have been held to be void while those limited as to time, space, or persons have been regarded as valid and duly enforced. Whether these exceptions to the general rule were wise and have really improved it, some may doubt, but it has been too long settled to be called in question.

GENERAL RESTRAINTS

A general restraint of trade cannot be defined with any degree of accuracy as it will vary according to the peculiar circumstances of each case. For the purpose of this discussion it may be said to be "such a restraint as prohibits a person from employing his talents, industry or capital in any undertaking within the country."

The general rule of law was laid down by Lord Macclesfield in the standard case of *Mitchell vs. Reynolds* (referred to in the introduction) that all contracts whether parol or under seal, whether by bond, covenant, or promise, with or without consideration, which are in general restraint of trade, or of any particular avocation or profession are absolutely void, because they are against public policy and oppressive on individual industry.

The rule probably arose from the fact that nobody conceived in those days that a restraint extending over the whole kingdom could be reasonable. Certainly it is no wonder that judges of former times did not foresee that the discoveries of science and the practical results of these discoveries might in time prove general restraints in some cases to be reasonable.

A very noticeable move toward relaxation was commenced by the case of *Roussillon v. Roussillon*, 14 Ch. D.351, which

has been endorsed and followed by the later cases of *Badische Anilin &c. Fabrik v. Schott* (1892, 3 Ch. 447) and *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt* (1893 Chan.630). The case of *Roussillon v. Roussillon* extends the territory over which a contract in restraint of trade may extend further than any American case which has been reported on the subject. In this case more than any other, ancient or modern is distinctly brought out the true ground upon which contracts in restraint of trade are declared void, that is, that under the particular circumstances of each case, and the nature of the particular contract involved in that case, the contract must be unreasonable. In determining that question of reasonableness or unreasonableness, the extent of the territory covered by the prohibition is one element and only one element in arriving at the conclusion. Some cases seem to have made this the final and conclusive test, without any regard to the nature of the contract or whether the public would or would not suffer any inconvenience or detriment if the contract should be enforced. On the other hand, it seems more reasonable to consider the question of area as only a subordinate and not a dominant consideration ; and that while some contracts might be void, because unreasonable, if the territory covered by them were small, other contracts of an entirely different nature might be valid even if a much larger area was included. It depends or should depend upon the nature of the business and whether such business could be done

throughout a large area by one occupying a central position therein ; or whether such business must from its very nature be limited to a circumscribed locality. In the latter case a contract might be void when embracing a much smaller territory than in the former.

In the American case of the *Diamond Match Co. v. Roeber* 106 N. Y. 473, Andrews J. although not called upon to dispose of the case upon the grounds of general restraint, nevertheless strikes the key note to the situation and by a masterly treatment of the question substantiates the logic and equity of the line of reasoning as set forth in *Roussillon v. Roussillon*. Another leading American authority to the same purport is that of *Beal v. Beal* reported in 31 Mich. 491.

The rule to be deduced seems to be this. The extent of a valid restriction depends much upon the nature of the business involved in the contract. If that be local, limited in its extent, confined to a narrow circle, the extent of the prohibition should be limited also ; if the business is far reaching, capable of being carried on by the same party through a large territory, like an express or carrier business, telegraph lines, publishing of books, etc., the prohibition may be co-extensive with the business. This flexible rule will always carry out the object of the rule itself, that is, protection to the promisee in his lawful possible business, and protection to the public against inconvenience or suffering for want of such trade or business in the neigh-

borhood or vicinity.

EXCEPTIONS

To the doctrine respecting contracts in restraint of trade, as above set forth, there have been ingrafted a few notable exceptions and in respect to which, the doctrine is said to have no application:--

(1) Contracts involving a trade secret.

It is settled law that a secret art is a legal subject of property ; and a bond for the exclusive right to it is not open to the objection of being in restraint of trade, but may be enforced by action at law, and requires the obligor not to divulge the secret to any other person. In the case of *Vickery v. Welch*, 19 Pick. (Mass.) 523, the action was upon a bond ; the condition of the bond being that the defendant would before September 1, 1836 convey to the plaintiff the Welch chocolate mills, together with his exclusive right and art or secret manner of making chocolate. The defendant refused to make the conveyance and when sued upon the bond contended that this obligation was void as being in restraint of trade. Per curiam, "We cannot suppose the case comes within that doctrine. The defendant claims to operate a secret art. The public are not prejudiced by the transfer of it to the plaintiff. If it were worth anything the defendant would use the art and keep it secret, and it is of no

consequence to the public whether the secret art be used by the plaintiff or the defendant. For authorities see *Peabody v. Norfolk* (98 Mass. 452).

(2) Contracts involving a business protected by a patent.

In the case of the *Morse Twist Drill and Machine Co. v. Stephen A. Morse* 103 Mass. 73, the defendant sold to the plaintiff two patents and agreed not to compete with him. Defendant was also engaged to serve as superintendent of the company for a term of three years beginning July 1, 1864, and covenanted to devote his whole time and efforts for building up the business of the company. In consideration of these covenants, the company agreed to pay him five thousand dollars in thirty days ; five thousand dollars more out of the net earnings and profits of the business after paying certain dividends ; and fifteen hundred dollars per year for a term of three years, payable monthly.

After the company had been running for a time, the defendant resigned and entered into the manufacture of the same patents elsewhere ; but sold them in the same market in competition with the plaintiff at reduced prices. To a bill in equity by the plaintiff to obtain an injunction the defendant demurred, upon the alleged ground that his covenants were in restraint of trade, contrary to public policy, and void, and that as such he had a legal right to avoid them. The court

held that the doctrine had never been extended to a business protected by a patent. The restriction in the sale of a patent though extending through the whole country is obviously no greater than the interest of the vendee requires; and by giving it, the vendor has been able to obtain an enhanced price for what he sold.

(3) Contracts involving the sale of periodicals.

In Ainsworth v. Bentley, 14 Weekly Rep. 630, the plaintiff had in 1851 purchased of the defendant "Bentley's Miscellany", which was then an established magazine. He took an agreement that the defendant would not publish another periodical of a like nature. In 1865 the defendant entered into an arrangement to become the publisher of the "Temple Bar", a periodical of like nature and within the restriction. It was objected that the agreement was void being in restraint of trade and unlimited, and that magazine publishing was a trade of itself. But Vice Chancellor Wood granted an injunction against violating the contract.

In Ingram v. Stiff, 5 Jur.(New Series) 947, a weekly periodical was sold, coupled with an agreement by the vendor not to publish, either alone or in partnership, any other periodical of a nature similar to it. This agreement was held to be valid and was enforced by injunction. It was held that the restraint was not greater, having regard to the subject matter of the contract, than was necessary for the pro-

tection of the purchaser.

In this country, there are periodical publications that have a very wide circulation ; and it is obvious that a purchaser of the proprietorship cannot afford to pay the full value, unless he can obtain from the vendor a valid restriction against competition, which restriction shall be extensive as his interest requires, though it may cover the whole of a state, or the whole country. The same would be true of some books; e.g. the author of a popular school book could not sell its proprietorship for its full value, unless he could bind himself not to prepare another book which should be used in competition with it.

(4) Extraterritorial trade contracts.

In *Perkins v. Lyman*, 9 Mass. 522, the defendant for valuable consideration, covenanted that he would not be, directly or indirectly, interested in any voyage to the northwest coast of America, or in any traffic with the natives of that coast, for seven years ; but failed to stand by his covenant. It was argued in his favor that the covenant was void as being in restraint of trade. Per curiam, "The principle relied on does not apply to this case. This is a trade but lately discovered and it can be beneficial but to a small number of adventurers. If one adventurer will engage to retire from it for a valuable consideration, and leave the con-

duct of it to others, it is lawful for him to do so, and his contract to that effect will be binding on him. Instead of an injury to the public, the community may receive a benefit from such a procedure, as it will go to prevent the trades being overdone, and so becoming profitable to none.

PARTIAL OR LIMITED RESTRAINTS

The leading American authority *Lange v. Werk*, 2 Ohio State 519, holds that to render a contract in restraint of trade valid it must appear :-

- I. THAT THE RESTRAINT IS PARTIAL.
 - II. THAT IT IS FOUNDED UPON AN ADEQUATE CONSIDERATION.
 - III. THAT IT IS REASONABLE AND NOT OPPRESSIVE.
-

I. PARTIAL RESTRAINTS.

The definition of a contract in partial restraint of trade, has been said by the court in *Horner v. Ashford*, 3 Bing. 328, to be "one which limits an individual to or excludes him from a circumscribed district in the employment of his industry, talents or capital". Chitty in his work on contracts has declared it to be a "restraint subject to some qualification as to time or space". Strictly speaking, however, neither of these definitions are accurate. A more satisfactory classification is that adopted by the learned English Barrister William Arnold Jolly. He divides partial restraints into

- A. Restraints particular as to places.
- B. Restraints particular as to persons.
- C. Restraints as to the mode or manner in which the trade is to be carried on.

A. Any contracts which restrains the business or industrial freedom within reasonable limits as to space, is partial. This doctrine was upheld in the standard case of *Mitchell v. Reynolds* and has been supported by a large number of similar cases. A few illustrations may be opportune.

A physician agrees with B not to practice within twenty miles of B's residence. The agreement is valid.

Butler v. Burleson 16 Vt. 176.

A sells out his farming mill business to B, covenanting not to carry on the same business south of the Wabash River, within thirty miles of Marion, Indiana.

Bowser v. Bliss, 7 Blackf. (Ind.) 344.

A covenant not to carry on the business of soap and ashed manufacturer for ten years within forty miles of Lockport, N.Y.

Ross v. Sadgbeer, 21 Wendell 166.

Not to practice law within six miles of Chili, Ill.

Linn v. Sigbee, 67 Illinois 75.

Not to practice medicine within ten miles of Litchfield, Conn.

Cook v. Johnson, 47 Conn. 175.

McClure's Appeal 58 Pa.St. 51.

Bigony v. Tyson, 75 Pa.St. 157.

The reasons why partial restraints as to space are held valid, are obvious. When a limit of space is imposed, the public, on the one hand do not lose altogether the services of the party in the particular trade ; he will carry it on in the same way elsewhere; nor within the limited space will

they be deprived of the benefits of the trade, because the party with whom the contract is made will probably, within those limits, exercise it himself. But where a general restriction limited only as to time is imposed, the public are altogether losers, for that time, of the services of the individual and do not derive any benefit in return.

B. 1. The second kind of partial restraints is where, although the restriction is not limited as to space, the contract leaves the covenantor the right to trade with particular persons.

In the case of *Gale v. Reed*, 8 East 83, the defendant covenanted during his life to employ exclusively the plaintiffs to make all cordage for the defendant, and for his friends and connections whom the plaintiff could trust. This was held to be partial because the defendant was still at liberty to supply such of his friends and connections as the plaintiffs did not trust.

2. Again where one party agrees to employ another in the way of his trade and the other undertakes to work exclusively for him, that is a partial restraint of trade.

Thus in the case of *Wallace v. Day*, 2 M. and W., 273, the plaintiff Wallace covenanted to serve the defendant as an assistant in the trade of a carrier and that he would not thenceforth exercise the trade of a carrier except as such assistant. This was held to be a valid agreement, Lord Abinger saying, "It cannot be said to be a contract in absolute

restraint of trade when a man contracts to serve another for his life in some trade.

Young v. Timmins, 1 Tyrrwh 226.

Hartley v. Cummings, 5 C. B. 260.

Whittle v. Frankland, 2 B. & S. 49.

Regina v. Welch, 2 Q.B. 357.

In America, however, the policy of the law requires labor to be unrestricted, and were it not so it might be a serious question whether the enforcement of the agreement to labor permanently and exclusively for a particular person, at his absolute dictation, is not in conflict with that clause of the Fourteenth Amendment of the Constitution of the United States, which prohibits involuntary servitude. If an agreement to labor permanently and exclusively for a particular person, without discrimination as to the line of labor, is valid and can be enforced, then an agreement for life service can be enforced. Hence a special engagement to work for a particular employer for a particular time will be sustained, but not a permanent and exclusive transfer of services.

3. Another instance of a contract in restraint of trade particular as to persons is where one trader covenants not to supply or deal with the customers of another in a particular trade.

Clearly this is not a general restraint for the covenantor is at liberty to trade with all the world, with the excep-

tion of a limited number of persons. Such a provision frequently occurs in a device of realty, where the devisee is restrained by the provisions of the will from having any dealings whatever with certain specified persons, and such conditions by the general weight of authority, controverts no rule of public policy and is binding upon the devisee. See Hutchin's Notes to Williams on Real Property, p. 94. It is necessary that the persons with whom intercourse is prohibited should be in each case ascertained for were it otherwise the courts would be unable to decide whether the restriction was partial or not.

C. The only reported English case which seems to properly come under this head is *Jones v. Lees*, 1 H. and N. 189. In that case the covenantor agreed not to manufacture stubbing machines without applying to them an invention patented by the covenantee. Lord Bowen declared that inasmuch as it merely regulates or confines the manner in which the trade is to be worked, it is a partial restraint.

Although the American authorities on this point are comparatively few, nevertheless the rule is recognized and sanctioned. Thus in the case of the *N.Y. Bank Note Co. v. Hamilton Bank Note Engraving and Printing Co.* reported in 83 Hun. 593, an agreement by a manufacturer of printing presses not to sell any presses, which could be used for certain kinds of printing was held to be valid.

This same line of reasoning is set forth in those cases where adjoining land owners mutually agree to use their lands in a certain specified manner and such equitable liens are held valid and binding. *Trustees of Columbia College v. Lynch*, 70 N. Y., 440, and also cases collected in Hutchins' Notes to Williams on Real Property, page 97.

II. ADEQUACY OF CONSIDERATION.

The contract in restraint of trade must be founded upon an adequate consideration. Lord Ellenborough says, "The restraint on the one side meant to be enforced should in reason be co-extensive only with the benefit to be enjoyed on the other."

A. Who determines the adequacy of the consideration ?

The decisions of the English Court are to the effect that the adequacy of the consideration will not be inquired into, and the parties must act on their own idea as to its sufficiency. So with the American authorities, the question whether or not the consideration for such restraint is adequate or inadequate is one into which the courts will not inquire. Where a consideration recognized in law as being valuable, is paid, the law presumes that the matter has been deliberately considered by the parties to the transaction and that it is commensurate with the restraint imposed. An apt illustration is brought out in the case of *Pierce v. Fuller*, 8 Mass.

223. The court thought the contract to be a reasonable one and the consideration of one dollar having been fixed and adopted by the parties as adequate, accepted the same as sufficient in law.

B. Seal as a consideration.

According to the law of contract generally the seal imports a valid consideration. This rule, of law, however, not only loses its force but has no application whatever to contracts in restraint of trade. This may at first seem to be a great innovation upon a well established principle of law, but when we take into consideration the reason upon which it is based we cannot doubt but that it is founded upon just and equitable ground. As said by Park B. in *Wash v. Day* 2 M. and W. 277, "the consideration in this class of contracts is required for a different reason from that in the ordinary contract, viz. that here it would be unreasonable for a man to enter into such a stipulation without some consideration though it must be left to his own judgment to determine the amount and nature thereof.

C. Good will as a consideration.

The transfer of the good will of one's business may be the inducement on which the vendee makes the purchase and this may be shown by the vendee as a consideration in support of a contract in limited restraint of trade.

Gilman v. Dwight, 13 Gray 356.

Boutelle v. Smith, 116 Mass. 111.

Mott v. Mott, 11 Barb. 127.

III. IT MUST BE REASONABLE.

A. It is not sufficient that the restraint be partial and founded upon consideration. The agreement must be reasonable. As to what shall be deemed a reasonable limitation, there is, and from the nature of things can be, no definite rule. No precise boundary can be laid down within which the restraint would be reasonable, and beyond which it would be unreasonable. It must depend upon the circumstances of each particular case, and the good sense and sound discretion of the tribunal which may have the case to settle.

The test as laid down by Tindal C.J. in *Horner v. Graves*, 7 Bing. 743 and approved of by all the subsequent cases down to the present time, is "whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public."

B. It is said that when the limitation is only colorable or unreasonable, it falls within the rule and not the exception and is therefore void. *Horner v. Graves*, 7 Bing. 735.

C. Where the restraint is larger than that required for the protection of the party in interest, it will be declared void.

3 Ohio Law Journal, 647.

D. If the contract be reasonable as to locality, indefiniteness as to conditions and duration will not invalidate it.

3 Ohio Law Journal, 648.

E. Does the cessation of business on the part of the covenantee relieve the covenantor from the obligations of the agreement ?

The early case of *Elves v. Croft*, 10 C.B. 241 holds that the fact that the plaintiff has quit the trade and no longer needs protection, makes no difference in an action on the bond and will not relieve from the original contract. So in the case of *Cook v. Johnson*, 47 Conn. 175, the court says : "The rule as to the contract is that if it is reasonable when made, subsequent circumstances, such as the fact of the covenantee ceasing business so as to no longer need the protection, do not affect its operation." A contrary doctrine is maintained by the supreme court of Iowa in the case of *Heichew v. Hamilton*, 49 Greene 317 and later in the case of *Berger and Yeiser v. Armstrong*, 41 Iowa 450, and is supported by the greater weight of authority and the reasons of justice and sound policy. In the latter case the court per Miller C.J., say : "It is not shown that the plaintiffs at the commencement of this proceeding, or at the time of moving for an injunction, were themselves engaged in or carrying on the drug business in the town of Toledo, nor does it state other facts showing that they had any longer a right to insist upon an observance of the contract on the part of the defendant. The equity of this view is manifest, for can it be said that to enforce a contract of this kind, after the plaintiff has ceased to need the protection and quit the business, is sound

in policy or within the spirit of the contract ? Such a decision as *Elves v. Croft* is contrary to public policy, wrong in principle and against the weight of authority.

MISCELLANEOUS POINTS.

- | | |
|--------------------|--------------------|
| I. PRESUMPTIONS. | III. DIVISIBILITY. |
| II. ASSIGNABILITY. | IV. REMEDIES. |
-

I. PRESUMPTIONS--

In all contracts in restraint of trade where nothing more appears, the law presume them bad, thus casting the burden of establishing their validity upon the person seeking their enforcement.

Morris Run Coal Co. v. Barclay Coal Co. 68 Pa.St. 173.

Chappel v. Brockway, 21 Wendell 157.

If, however, the circumstances of the transaction are set forth, that presumption is excluded and the court is to judge of those circumstances and determine accordingly. If it is capable of construction which will render it valid, it is to be so construed.

Lorillard v. Clyde, 86 N.Y. 384.

Where the circumstances of the transaction are not set forth, thus establishing the presumption of invalidity, it is always a question of law for the court to determine whether such presumption has been overcome, and should never be submitted to a jury.

Horner v. Graves, 7 Bing. 735.

II. ASSIGNABILITY--

There is a general proposition of law to the effect that personal contracts and penalties for torts are not capable of passing by assignment. The action is personal. The real party in interest must sue. Some of the courts have erroneously applied this doctrine to covenants in restraint of trade. The covenant in restraint of trade, however, does not attach to the covenantee personally, but only as an incident to the business. It cannot exist in his favor after he has ceased to require its protection. In whose favor does it exist? Certainly if it exists at all it exists in favor of his successor who has by the assignment acquired his interest in the business. To reason otherwise would be fallacy.

California Steam Navigation Co. v. Wright, 6 Cal.258.

Butler v. Burleson, 16 Vermont, 175.

III. DIVISIBILITY--

A contract may sometimes be valid in part and invalid in other particulars. As a general rule where a promise is made for one entire consideration, a part of which is fraudulent, immoral or unlawful, and the provisions as a whole are so connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning as to be incapable of being severed, then the whole promise fails. But if there are several independent promises depending upon several distinct and corresponding

considerations, the fact that the consideration upon which one of the promises is based is invalid, does not necessarily affect or destroy the validity and efficacy of the others. Each promise with its corresponding consideration forms one entire and independent transaction in itself, and if made in compliance with the principles of law, will be recognized and enforced, notwithstanding the fact that a similar promise based upon an invalid consideration, which joined with it as a link in the chain of one entire transaction, falls to the ground for want of legal support.

Bishop v. Palmer, 146 Mass. 469.

IV. REMEDIES--

1. Action for damages.

It is often a doubtful question whether the sum stipulated to be paid on the non-performance of a condition is in the nature of a penalty, or is the amount settled upon by the parties for the purpose of making that certain which would otherwise be uncertain. It must rest upon the construction to be given to the language used, aided by the facts proved, which gave birth to the instrument. In the ordinary contract the court is very apt to consider it as a penalty if the jury can, without great difficulty, decide approximately the amount of damage which the aggrieved party has sustained. But in contracts and restraint of trade the courts are very reluctant and rarely interfere with the amounts which

the parties have agreed upon as damages. This is due to the fact that the parties themselves have better means of knowledge and can with a greater degree of certainty, determine what damages will be a sufficient recompense for the injury sustained than a jury, from their limited source of information, can possibly hope to ascertain.

2. Injunction.

A court of equity, in a proper case, will by an injunction enjoin the covenantor from violating the terms of the contract. As in all actions, equity will grant this relief only in those cases where there is no adequate and complete remedy at law, and that a breach of the contract, either actual or threatened has taken place.

Dwight v. Hamilton, 113 Mass. 175.

C O N C L U S I O N

Actuated by a desire to keep the extent of this discussion within reasonable limits, and to present briefly and concisely the more important and salutary phases of the subject, the writer has been obliged to disregard and cast aside much of the substance which would tend to give the main structure a more thorough and polished finish.

The very interesting subject of "combinations", into which our present discussion frequently tempts us, forms in itself a question too extended for proper discussion here.

Involuntary restraints, as those imposed by grants, customs and by-laws have been dispensed with, not so much for the reason of time required for their treatment as to their impracticability.

The voluntary restraints, or those imposed upon the parties of their own free will, are those with which we have been chiefly concerned, and both from historical and practical standpoints afforded an interesting and pleasant research.

As to the present status of the law on this subject, little may be added by way of conclusion to what has already been said. At the early common law these contracts diminished the means of supporting the family, tended to deprive the public of the services of useful men, discouraged industry,

diminished productions, prevented competition and enhanced prices. The effect of these contracts at the present time are too well understood to require assertion here. We have emerged from that semi-civilized state and there is no evidence that contracts in restraint of trade under the healthy regulations to which they are now required to conform, work any public mischief and the contract is not one of such a nature that it tends to deprive men of employment, and unduly raise prices or put an end to competition.

There is one thing very evident and that is that the idea public policy as it prevails throughout these contracts has today lost its force and application. The fear of pauperism arising from the restraint imposed upon the individual is somewhat absurd. There is another reason why the element of public policy should be discarded. To determine what is and what is not prejudicial to the interests of trade, requires an exceptional insight into economic conditions and the nature of commercial transactions, and is a task to which few judges may with any degree of propriety or hope of success apply themselves. Public policy has been termed an "unruly horse" and if I may be pardoned for polishing the simile, I would say, let us not enter him in the race of contracts in restraint of trade. He has no standing there. He might in the wilderness of some boundless prairie prove to be a steed worthy of his metal, but in the refined race track which modern civilization has erected for trade, he is neither useful nor ornamental but a menace to all.

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